Supreme Court of the United States

OCTOBER TERM, 1941

No. 279

CANADIAN AVIATOR, LTD.,

Petitioner,

against

THE UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR PETITIONER

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Opinions Below

The opinion of the District Court is not reported except at 1943 A. M. C. 744. It is printed at pages 4-5 of the record.

The opinion of the Circuit Court of Appeals, and the dissenting opinion of Biggs, C. J., are reported at 142 F. 2d 709, and 1944 A. M. C. 732. They are printed at pages 7-15 and 15-22 respectively of the record.

Jurisdiction

Jurisdiction is based on Section 240(a) of the Judicial Code as amended, 28 U. S. Code § 347.

Statement

This is an admiralty suit by Canadian Aviator, Ltd., owner of steamship *Cavelier*, against the United States of America, owner and operator of Navy patrol boat *YP 249*, to recover damages sustained as a result of *No. 249's* leading the *Cavelier* over, and causing her to strike, a submerged wreck while entering Delaware Bay on the night of July 7, 1942.

The question presented is whether the Public Vessels Act, Title 46 U. S. Code, Sections 781-790, confers jurisdiction of such a suit.

This question arises upon exceptions to the libel. The pertinent allegations of the libel are as follows (R. 2-3):

> "THIRD: On July 7, 1942 the *Cavelier*, laden with cargo, was bound on a voyage from a Canadian port to a Jamaican port. Her route was fixed by orders from the United States Naval authorities, and upon orders from United States Naval authorities the *Cavelier* approached the entrance to Delaware Bay for the purpose, in obedience to such orders, of entering Delaware Bay. When the *Cavelier* reached a point in the vicinity of the entrance to Delaware Bay she received instructions from the United States Naval authorities that *YP 249* would precede the *Cavelier* through the waters of the entrance to Delaware Bay, and received orders from such authorities to follow directly astern of the *YP 249* in her transit of the waters constituting the entrance to Delaware Bay. Pursuant to these orders the *Cavelier* proceeded directly astern of the *YP 249* and attempted as ordered to enter Delaware Bay following directly astern of the *YP 249* but about 9:30 p.m., while proceeding directly astern of the *YP 249* as ordered, the *Cavelier* struck a submerged wreck and sustained serious damage.
>
> FOURTH: The aforesaid striking of the submerged wreck by the *Cavelier* and the damages resulting

therefrom were not caused or contributed to by any fault or neglect on the part of the *Cavelier* or those in charge of her, the libellant herein, or anyone for whom the libellant may be responsible, but were due solely to the fault and negligence of the United States vessel *YP 249* and those in charge of her in the following respects among others:

1. She was not in charge of a competent person.

2. She failed to keep a good look-out.

3. She failed to guide the *Cavelier* safely through the waters constituting the entrance to Delaware Bay.

4. She led the *Cavelier* directly over a submerged wreck.

5. She failed to give the *Cavelier* proper or adequate guidance as to making a safe entrance into Delaware Bay.

* * * * * *

SIXTH: Libellant elects to have this suit proceed in accordance with the principles of libels *in personam* and *in rem*."

Respondent's exceptions are as follows (R. 3-4):

FIRST: The libel fails to state a cause of action for which the United States has consented to be sued.

SECOND: The libel fails to state a cause of action within the provision of the Public Vessels Act, 1925, or the Suits in Admiralty Act, 1920.

Errors Intended to be Urged

The Court below erred in holding

1. That the libel does not allege a cause of action for damages "caused by" a public vessel of the United States;

2. That Congress intended to authorize suit only where the public vessel is "the physical instrument by which the damage was done";

3. That the Act does not authorize suit on principles of liability *in rem;* and

4. That to state a cause of action under the Act it is not enough to allege that the damages resulted from the negligence of those in charge of the public vessel.

Statute Involved

The Public Vessels Act, March 3, 1925, 43 Stat. 1112, Title 46 U. S. Code, §§ 781-790, provides in part as follows—the complete text of these sections is printed in the appendix, *infra*, page 25:

> § 1. "A libel in personam in admiralty may be brought against the United States * * * for damages caused by a public vessel of the United States * * *."
>
> § 2. "Such suit shall be brought in the district * * * in which the vessel or cargo charged with creating the liability is found * * *. Such suits shall be subject to and proceed in accordance with the provisions of [the Suits in Admiralty Act] * * * in so far as the same are not inconsistent herewith, except that no interest shall be allowed * * *."

The Suits in Admiralty Act provides in part as follows—the complete text of the section is printed in the appendix, *infra*, page 26:

> § 3. "* * * If the libellant so elects in his libel the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libellant in any proper case from seeking relief in personam in the same suit."

POINTS

I. The libel alleges a cause of action for damages "caused by a public vessel of the United States".

The libel alleges that about 9:30 p. m. July 7, 1942, libellant's steamship *Cavelier,* while following *YP 249* through the entrance to Delaware Bay as she had been ordered to do, was led by *No. 249* over a submerged wreck and sustained the damage in suit. The libel further alleges that its damages were caused solely by the negligence of *YP 249* and those in charge of her in five enumerated particulars (R. 2).

Section 1 of the Public Vessels Act authorizes suit against the United States "for damages caused by a public vessel of the United States". The libel plainly alleges that the *Cavelier,* in obedience to orders, was following *YP 249,* which led her on to the submerged wreck. It is difficult to see how the libel could more plainly allege that the damages were "caused by" a public vessel of the United States.

A majority of the Circuit Court of Appeals, however, expressed the view that although the language of the Act extended the waiver of sovereign immunity "beyond cases of actual collision to those cases in which the vessel is the *physical cause* of the injury *even though it does not come into actual physical contact* with the injured object", nevertheless it did not "extend the waiver of immunity beyond those cases in which the vessel itself was *the physical instrument by which the damage was done*" (italics ours; R. 10-11). We cannot reconcile these two concepts. If the jurisdiction is limited to those cases where the public vessel "was the physical instrument by which the damage

was done", then it cannot extend to cases of damage caused by the public vessel "even though it does not come into actual physical contact".

Both the language of the Act and the earlier decisions demonstrate the error of the view of the majority below. The Act authorizes suit for damage "caused" by the public vessel, not "done" by her. The word "caused" has a commonly accepted legal meaning and it is elementary that the words of a statute are to be interpreted in their ordinary and usual sense, with the meaning commonly attributed to them. *United States* v. *Stewart*, 311 U. S. 60, 63; *Lincoln* v. *Rickets*, 297 U. S. 373, 376; *Old Colony Railroad Co.* v. *Commissioner*, 284 U. S. 552, 560; *DeGaney* v. *Lederer*, 250 U. S. 376, 381.

This rule applies as well where the statute is to be construed strictly. In *Sacramento Navigation Co.* v. *Salz*, 273 U. S. 326, this Court said:

> "It is said that the Harter Act is to be strictly construed. The Main v. Williams, 152 U. S. 122, 132. Even so, the rule of strict construction is not violated by permitting the words of a statute to have their full meaning, or the more extended of two meanings. The words are not to be bent one way or the other, but to be taken in the sense which will best manifest the legislative intent" (pp. 329-30).

In *Montclair* v. *Ramsdell*, 107 U. S. 147, this Court said:

> "It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed" (p. 152).

It would be derogatory of Congress to hold that the words "caused by" were intended to have any other than the com-

mon legal meaning of the word "caused", viz., "proximate cause". Plainly the manoeuvre of *YP 249* was the proximate cause of the damage to the *Cavelier* and it is entirely fanciful to say, as did the majority below, that "the physical cause was the submerged wreck" (R. 14-15). It might as well be said that when a tug, by her negligent navigation, strands her tow, the strand rather than the tug's negligence is the proximate cause. Under a long line of decisions the proximate cause is that act or omission which sets in motion a chain of events resulting in damage. The libel in suit plainly alleges that *YP 249*, by setting her own course across the wreck, caused the *Cavelier* to strike the wreck and suffer the damage sued for.

This Court's decision in *Standard Oil Company* v. *United States*, 267 U. S. 76, affords a close parallel. There steamship *Llama* during the previous war was stopped by the British warship *Virginia* and ordered by those in command of the *Virginia* to proceed to Kirkwall by a specified route. While so proceeding the *Llama* struck a rock and was a total loss. She was insured under war risk policies which covered loss resulting from warlike acts, and under marine policies which covered loss from striking a rock. This Court had to determine whether the proximate cause of the loss was the striking of the rock, a marine peril, or the orders from the *Virginia*, a war peril. This Court held that the orders from the *Virginia* were the proximate cause. The analogy is unmistakable. The submerged wreck here was no more the proximate cause of the damage to the *Cavelier* than was the rock the proximate cause of the loss of the *Llama*. The manoeuvre of *YP 249* in leading the *Cavelier* over the submerged wreck was the proximate cause here just as the orders from the *Virginia* in fixing the *Llama's* route were the proximate cause of her loss.

In *The G. R. Booth*, 171 U. S. 450, a case of detonators exploded in a ship, opening her side allowing sea water to flow in causing cargo damage. The explosion was not a peril of the sea but the entry of the sea water was, and the question was whether the explosion or the entry of sea water was the proximate cause of the damage. This Court held that the explosion was the proximate cause because it set in motion the chain of events which resulted in the damage.

In *Milwaukee etc. Railway Co.* v. *Kellogg*, 94 U. S. 469, this Court laid down the applicable rule:

> "The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown into the market place. 2 Bl. Rep. 892. The question always is, was there an unbroken connection between the wrongful act and the injury, a continuous operation" (pp. 474-5).

Plainly *YP 249* caused the *Cavelier* to strike the submerged wreck as surely as if, like the article on the other end of the chain, she had been pulled there by *YP 249*.

An interesting application of the proximate cause rule to an inanimate object is found in *Richardson* v. *Iowa State Travelling Men's Association*, 291 N. W. 408, Supreme Court of Iowa. There plaintiff's decedent, travelling in an Army airplane, was forced to jump when the plane ran out of gasoline and lost his life. The insurance policy provided that there should be no liability for death "caused by any aerial conveyance". Nevertheless claim was made on the policy on the theory that the decedent's death was

caused by his striking the ground. The Court, however, refused to accept such reasoning and held that the death was in fact "caused by" the airplane, although not by any contact. So here, although there was no physical contact between *YP 249* and the *Cavelier*, she "caused" the *Cavelier* to strike the submerged wreck and sustain damage.

There is nothing novel in the admiralty about holding that a vessel "caused" damage to another although she was not herself the physical instrument inflicting the damage. There are, for example, numerous "crowding" cases. These are cases where one vessel, in order to avoid colliding with another, alters her course and sustains damage by stranding or striking some third vessel or pier. It is uniformly held in these cases that the crowding vessel "caused" the damage, although not herself the physical instrument. *The Clevelander*, 83 F. 2d 947, C. C. A. 2; *The Lake Shore*, 201 Fed. 449, N. D. Ohio; *Barge Ruth C.*, 1926 A. M. C. 1508, S. D. N. Y.

There are also the swell damage cases, where one vessel, by her excessive speed, sets up heavy waves or swells which cause another to strike some third object and sustain damage. In these cases the Courts have uniformly held that the vessel setting up swells by her excessive speed "caused" the damage although not herself the physical instrument inflicting it. *The Kronprinzessin Cecilie*, 192 Fed. 27, C. C. A. 2; *The Campania*, 203 Fed. 855, C. C. A. 2; *The Washington Irving*, 250 Fed. 797, C. C. A. 2; *The Luke*, 19 F. 2d 923, aff'd 19 F. 2d 925, C. C. A. 2; *The J. C. Hart*, 43 F. 2d 566, E. D. N. Y.; *The Favorita*, 43 F. 2d 569, E. D. N. Y.

Prior Decisions Under the Public Vessels Act

There have been several decisions interpreting the Public Vessels Act in cases where the public vessel was not the physical instrument of the damage. In each of these the Courts have, without exception, sustained the jurisdiction, although there was no physical contact.

In *New England Maritime Co.* v. *United States*, 55 F. 2d 674, D. C. Mass., affirmed on the opinion below, 73 F. 2d 1016, C. C. A. 1, suits were brought under the Public Vessels Act for the deaths of three members of the crew of the schooner *Mills* sunk in collision with the destroyer *Childs*. The three decedents survived the collision, i. e. they were not killed, or injured, or even touched by the destroyer. However, they were drowned while attempting to escape from the schooner before she sank. The destroyer was not the physical instrument of death. Both the District Court and the Circuit Court of Appeals held that the deaths were "caused by" the destroyer and allowed recovery. The Court said:

> "I think the libellants in these death cases are correct in saying that a broad construction should be placed upon this Act, that it was obviously the purpose of the Act to waive the sovereign's immunity with respect to accidents on the high seas caused by public vessels, and thereby relieve Congress of the multiplicity of special acts necessary to compensate persons who had suffered damages either to their person or property. The statute is remedial, and, under well-settled practice of statutory construction, should be liberally construed" (p. 685).
>
> "In the instant case, after examining the proofs, and the cases brought before me, I am constrained to hold in these death cases that those who unfortunately lost their lives in this tragedy by drowning, are shown by the testimony to have been placed in a position of peril by the fault of the destroyer Childs. They lost their

> lives in an attempt to get to a place of safety. I find that the loss of their lives was nevertheless a proximate result of the fault of the defendant" (p. 687).

Coastwise Transportation Corporation v. *United States*, 43 F. 2d 401, D. C. Maine, involved a situation strikingly similar to that in suit. There a Navy tug undertook to bring libellant's vessel into port. While doing so she led libellant's vessel across shoal water where the latter stranded and sustained damage. The only difference between the two cases is that there the two vessels were attached by a hawser whereas here there was no attachment. Nevertheless, *YP 249* as surely controlled the course and movements of the *Cavelier* by her own movements (because the *Cavelier* had been ordered to, and did, follow in her wake) as the tug in the *Coastwise* case controlled the movements of libellant's vessel. There jurisdiction under the Public Vessels Act was upheld and recovery allowed.

In *Porello* v. *United States*, 53 F. Supp. 569, D. C. N. Y., the Court held that the damage need not be physically done by the public vessel to sustain the jurisdiction saying:

> "The argument is that the words 'damages caused by a public vessel' refer to damage done physically by the vessel itself, as in the case of a collision, and not to damages for personal injuries caused by the negligence of employees. I do not think that this argument is tenable: * * *" (p. 569).

In *McCormick Sand & Gravel Corporation* v. *United States* (not officially reported), 1938 A. M. C. 1569, D. C. N. Y., the destroyer *Dahlgren*, proceeding at an excessive speed, caused high waves which caused vessels in tow of tug *Dauntless* to pound against each other and sustain damage. Suit was brought against the United States to re-

cover for the damage although there was no physical contact between the damaged vessels and the public vessel. The Court upheld the jurisdiction and allowed recovery.

In *The Harding Highway*, 53 F. 2d 938, C. C. A. 3, a Government dredge, attempting to pass a privately owned ferryboat in the Christiana River, crowded the ferryboat which, giving way to avoid the dredge, struck a stone jetty and sustained damage. There was no contact between the dredge and the ferryboat. Suit was brought under the Public Vessels Act * and the Court sustained the jurisdiction and allowed recovery. The dredge there caused the ferryboat to strike the stone jetty as surely as *YP 249* here caused the *Cavelier* to strike the submerged wreck.

See also *The Zeller No. 8*, 45 F. Supp. 359, D. C. N. Y., and *Haug* v. *United States*, 5 F. Supp. 418, D. C. Wash.

Authorities Distinguished

The majority below referred to *The Osceola*, 189 U. S. 158, and *The Vera Cruz* (*No. 2*), 9 L. R. Prob. Div. 96 (1884), as bearing upon the point (R. 11-13). The majority's reliance upon these decisions points up its fundamental error in holding that the Act is limited to "those cases in which the vessel itself was the physical instrument by which the damage was *done*" (italics ours; R. 11). Both *The Osceola* and *The Vera Cruz* construe statutes conferring jurisdiction of claims for damage "*done* by" a vessel, language far narrower than the word

* While it does not appear from the reported opinion that this suit was under the Public Vessels Act, we have examined the record on appeal to the Circuit Court of Appeals for the Third Circuit and find that the libel so alleges and that the answer of the United States admits the allegation of the libel that the dredge was a public vessel of the United States.

chosen by Congress in the Public Vessels Act, viz., "*caused* by".

The majority below also sought support in *O'Neal* v. *United States,* 11 F. 2d 869, D. C. N. Y., aff'd 11 F. 2d 871, C. C. A. 2, and *Dobson* v. *United States,* 27 F. 2d 807, C. C. A. 2 (R. 13). These cases have no bearing on the point. The *O'Neal* case involved personal injuries sustained when a shell exploded without negligence on board a public vessel. The vessel herself was inert and the injuries were neither done by nor caused by the vessel, or her personnel, but by an exploding shell without negligence.

The *Dobson* case involved claims for the death of Naval officers resulting from a collision on the high seas. The Court held that the Public Vessels Act did not create a right to recover for the death of a Naval officer although "caused by" a public vessel, not because the language of the Public Vessels Act was not broad enough, but because Congress had made previous statutory provision to pay such claims and the Court was not willing to infer that Congress, by the Public Vessels Act, intended to repeal such prior and specific legislation.

II. The legislative history of the Public Vessels Act establishes that Congress did not intend to limit the waiver of sovereign immunity to cases where the public vessel was the physical instrument by which the damage was done.

If the Court below was right in holding that the Act is limited to cases where the public vessel is "the physical instrument by which the damage was done" (R. 11), then jurisdiction exists only in collision cases. Plainly, however, this was not the Congressional intent.

The first general waiver of sovereign immunity is contained in the Suits in Admiralty Act, March 9, 1920, 41 Stat. 525, 46 U. S. Code, §§ 741-752. This Act applies to merchant vessels only but extends to all damage caused by merchant vessels of the United States. Having rid itself of the need for considering a multitude of private Acts with relation to merchant vessels, Congress then proceeded to consider the waiver of sovereign immunity in public vessel cases. In the 68th Congress H. R. 6989 was introduced as a step toward that end. It was, however, limited to collision cases. Its title was:

> "A bill authorizing suits against the United States in admiralty *for collisions caused by* and salvage services rendered to public vessels belonging to the United States, and for other purposes" (italics ours).

Section 1 of H. R. 6989 provided:

> "That a libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by *collision* by a public vessel of the United States . . ." (italics ours).

This bill was referred to various Executive Departments for comment, following which the Committee on Claims of the House of Representatives reported a substitute bill, H. R. 9535. This bill was enacted by both Houses and became the Public Vessels Act. Senate Report No. 941, 68th Congress, 2nd Session.* The title of H. R. 9535, the substitute bill, was:

> "An act authorizing suits against the United States in admiralty *for damages caused by* and salvage serv-

* The substitute bill was reported to the House of Representatives by its Committee on Claims in Report No. 913, 68th Congress, 1st Session. After the substitute bill passed the House it was considered in and reported by the Senate Committee on Claims, Report No. 941, 68th Congress, 2nd Session. The Senate Committee adopted the report of the House Committee as its report. Hereafter in this brief references are to the Senate report.

> ices rendered to public vessels belonging to the United States, and for other purposes" (43 Stat. 1112; italics ours).

The title of the statute may be resorted to for clarification. *Bengzon* v. *Secretary of Justice*, 299 U. S. 410, 416.

Section 1 was broadened by striking out the words "by collision".

These changes are, we submit, of great significance in determining the purpose of the Act. If Congress had intended to limit the act to collision cases or cases where the public vessel was the "physical instrument" of damage, it could not have made these changes.

The debates in Congress establish that there was no purpose to limit the Act to collision or "physical instrument" cases. Mr. Underhill, who introduced in the House the bill which became the Public Vessels Act, told the House that it permitted suit in admiralty for damage "by collision *or other fault* of government *vessels* and government *agents*". He said:

> "The bill I have introduced simply allows suits in admiralty to be brought by owners of vessels whose property has been damaged by collision or other fault of Government vessels and Government agents." Congressional Record, 68th Congress, 2nd Session, January 19, 1925, p. 2087.

In the Senate, Senator Bayard, who sponsored the bill there, told the Senate that the bill allowed suit in cases of "maritime accidents in which United States vessels are concerned", accidents "by reason of the shortcomings of a United States ship". He said:

> "Mr. President, the Senator from Arkansas is quite right; it is a measure of great importance. There are continuous applications being made to the Claims Committee of both Houses for the consideration of bills to

> reimburse people who have suffered *damage from maritime accidents in which United States vessels are concerned*, to enable them to present their suits in the various district courts. In this last Congress there were nearly 200 such claim bills introduced in the two Houses.
>
> Outside of that, there are many claims which must be settled by the Department of State, because our own nationals are forbidden going into our own Courts, and the nationals of other countries cannot come in, and this bill is to remedy that situation. It would give a person aggrieved because of *an accident by reason of the shortcomings of a United States ship* the right to go into a district court and prosecute his action." Congressional Record, 68th Congress, 2nd Session, February 12, 1925, p. 3560 (italics ours).

There is nothing in the remarks of any member of the House or Senate to indicate that the intention was to limit the Act to collision or "physical instrument" cases.

The majority below thought that the substitute bill was no broader than the original bill because the Committees on Claims attached to their reports the letters from the Executive Departments which had reference to the earlier (collision) bill (R. 11). Such reasoning gives greater weight to the subject matter of the letters of the Departments than to the considered and deliberate changes in the language of the bill made by the Congress—and ignores the language chosen by the Congress.

The majority below considered that the attachment of the reports of the Executive Departments to the Committees' reports indicated that Congress did not intend to permit suit against the United States "for all damages resulting from the negligence of Naval personnel aboard public vessels" (R. 11). However that may be, we have not contended that the Act authorizes suit "for all damages resulting from the negligence of Naval personnel

aboard public vessels". The fact that the majority below thought it necessary to disavow such an intent by Congress is illustrative of its misapprehension of the allegations of the libel. The Act permits suit for damages caused by a public vessel both upon principles of liability *in rem* and *in personam* and the libel states a cause of action upon both such principles.

Suit on Principles of Liability in Rem

Section 1 of the Act personifies the vessel as the offending thing and contemplates liability on *in rem* principles. It authorizes suit for damages "caused by a public *vessel* of the United States" (italics ours).

The vessel is also personified in Section 2 which provides that the

> "suit shall be brought in the district court of the United States for the district in which the *vessel* or cargo *charged with creating the liability* is found."

Plainly this language contemplates liability *in rem* for the vessel is referred to as the offending thing.

In his letter of recommendation to the Committee on Claims Mr. Chief Justice Stone, then Attorney General, declared his understanding that the Act contemplated liability *in rem*. He said:

> "I do not understand from the proposed bill whether the relief to be granted shall be determined upon principles of in rem liability solely or whether it shall be determined both in rem and in personam liability." (Senate Report No. 941, 68th Congress, 2nd Session, page 12.)

The only question in the mind of the then Attorney General was whether the Act contemplated suit on prin-

ciples of *in personam* liability in addition to suit on principles of *in rem* liability.

Furthermore, the Public Vessels Act expressly incorporates the provisions of the Suits in Admiralty Act, March 9, 1920, c. 95; 41 Stat. 521; 46 U. S. Code, § 741 et seq. Section 2 of the Public Vessels Act provides:

> "• • • Such suits shall be subject to and proceed in accordance with the provisions of Chapter 20 or any amendment thereof, in so far as the same are not inconsistent herewith, except that no interest shall be allowed."

Chapter 20 referred to is the Suits in Admiralty Act, Section 3 of which provides in part:

> "Such suits shall proceed and be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties • • •. If the libellant so elects in his libel, suit may proceed in accordance with the principles of libels *in rem* wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel *in rem* might have been maintained. Election so to proceed shall not preclude the libellant in any proper case from seeking relief *in personam* in the same suit. • • •" (46 U. S. Code, §743).

By the two Acts, the Suits in Admiralty Act and the Public Vessels Act, Congress has plainly attempted to create an integrated system to afford redress to those who sustain damages caused by the merchant and public vessels of the United States. The two Acts are *in pari materia* and must be construed as part of the same legislative scheme. *State of Maine* v. *U. S.*, 45 F. Supp. 35, aff'd 134 F. 2d 574, C. C. A. 1, certiorari denied, 319 U. S. 772.

Mr. Chief Justice Stone, then Attorney General, understood that the Public Vessels Act was co-extensive with the Suits in Admiralty Act. In his letter to the Committee on

Claims, Senate Committee Report No. 941, 68th Congress, page 11, he said:

> "The proposed bill intends to give the same relief against the Government * * * as is now given against the United States in the operation of its merchant vessels, as provided by the Suits in Admiralty Act * * *."

It is an ancient and firmly established principle of the admiralty (and it was to the admiralty, not the common law, court that Congress gave jurisdiction under the Public Vessels Act) that the vessel herself is a juristic person and that her acts and omissions, although actuated by her personnel, are personal acts of hers, for which she, as a juristic person, *in rem*, is legally responsible. *The Brig Malek Adhel*, 2 How. 210, 233, 234; *The China*, 7 Wall. 53, 68-9; *The Barnstable*, 181 U. S. 464, 467; *Ralli* v. *Troop*, 157 U. S. 386, 402-3; *The John G. Stevens*, 170 U. S. 113, 120.

The majority below brushed aside the *in rem* liability obviously contemplated by Congress on the ground that "the personalization of a ship has no significance in the absence of an enforceable maritime lien" (R. 14) and, since Section 8 of the Public Vessels Act expressly provides that no lien shall be created, Congress cannot have contemplated liability *in rem* (R. 14).

Congress *expressly* provided for liability *in rem* in the Suits in Admiralty Act and *expressly* incorporated the Suits in Admiralty Act in the Public Vessels Act. Why, unless it contemplated suits on *in rem* principles under the Public Vessels Act as well as under the Suits in Admiralty Act? Furthermore, the absence of an enforceable lien is no bar to a proceeding against the sovereign on principles of *in rem* liability if the sovereign wishes to permit suit

in that fashion. Since this Court's decision in *Clyde Mallory Lines* v. *United States*, 317 U. S. 395, it seems clear that there is no lien against even a merchant vessel of the United States, yet no one denies that the sovereign has consented to be sued on principles of *in rem* liability in respect of its merchant vessels.

The majority below, overlooking the plain allegations of *in rem* liability in the libel, chose to construe the allegations as in reality against the crew of *YP 249*, saying:

> "Libellant's complaint in reality is of the negligence of the navigating officers of the *YP 249* whose directions the *Cavelier* was following" (R. 15).

Patently this view is erroneous. The libel alleges that *YP 249* was herself, as a physical thing, the *Cavelier's* guide through the waters of the entrance to Delaware Bay and that that physical object, which the *Cavelier* was following, so directed her own movements as to lead the *Cavelier* across and into collision with the submerged wreck. The libel does not allege that erroneous orders were given by some individual but that *YP 249* herself, a physical thing, in admiralty a legal entity, physically, by her own movements, negligently directed the movements of the *Cavelier* and caused her to collide with the wreck.

The specifications of fault in the libel (R. 2) are specifications of liability *in rem*. The first specification is that *YP 249* "was not in charge of a competent person". It is well settled that *in rem* liability exists if this charge be proved. *The Teaser*, 299 Fed. 476, D. C. Pa.; *The Prudence*, 190 Fed. 671, D. C. Va.

The second specification of fault is that "she failed to keep a good lookout". Here again *in rem* liability is clear if the charge be proved. *St. John* v. *Paine*, 10 How. 557,

585; *Newton* v. *Stebbins*, 10 How. 586, 607; *The Genesee Chief*, 12 How. 443, 463.

The third, fourth and fifth specifications of fault are that *YP 249* "failed to guide the *Cavelier* * * *. She led the *Cavelier* * * *. She failed to give the *Cavelier* proper or adequate guidance * * *". These are allegations that the vessel, a thing, a *res*, a legal entity, not her personnel, failed in her duty and clearly charge liability *in rem*. Compare *Coastwise Transportation Corp.* v. *United States*, *supra*, 43 F. 2d 401.

SUIT ON PRINCIPLES OF LIABILITY IN PERSONAM

Having reached the conclusion that the Act does not authorize suit on *in rem* principles (R. 13-14) the majority below proceeded to emasculate the Act by holding that it does not authorize suit in this case because libellant's complaint "in reality is of the negligence of the navigating officers of the *YP 249*, whose directions* the *Cavelier* was following" (R. 15).

The libel alleges faults against those in charge of *YP 249* in so controlling *YP 249* that she committed the *in rem* faults specified. The libel alleges:

> "Fourth: The aforesaid striking of the submerged wreck * * * were due solely to the fault and negli-

* There is no allegation in the libel that the *Cavelier* was following any directions received from any person on *YP 249*. The allegation is

> "When the *Cavelier* reached a point in the vicinity of the entrance to Delaware Bay she received instructions from the United States Naval authorities that *YP 249* would precede the *Cavelier* through the waters of the entrance to Delaware Bay, and received orders from such authorities to follow directly astern of the *YP 249* in her transit of the waters constituting the entrance to Delaware Bay. Pursuant to these orders the *Cavelier* proceeded directly astern of the *YP 249* * * *" (R. 2)

> gence of the United States vessel *YP 249 and those in charge of her* in the following respects among others * * *" (R. 2; italics ours).

The Public Vessels Act authorizes suit on principles of libels *in personam* as well as upon principles of libels *in rem*. Section 1 of the Act provides that "a libel *in personam* in admiralty may be brought * * *" (italics ours).

Section 2 of the Act provides that the suits authorized "shall be subject to and proceed in accordance with" the Suits in Admiralty Act. Section 3 of the Suits in Admiralty Act, 46 U. S. Code, § 743, provides that the libellant may elect to proceed as *in rem* but that "election so to proceed shall not preclude the libellant in any proper case from seeking relief *in personam* in the same suit".

Since the Suits in Admiralty Act is expressly incorporated in the Public Vessels Act the latter likewise authorizes suit *in personam*. In his report to the Committee on Claims concerning the Public Vessels Act when it was pending in Congress Mr. Chief Justice Stone, then Attorney General, said:

> "The proposed bill intends to give the same relief against the Government * * * as is now given against the United States in the operation of its merchant vessels, as provided by the Suits in Admiralty Act * * *" (Senate Committee Report No. 941, 67th Congress, p. 11).

In *Benedict on Admiralty*, 6th Edition, Vol. 1, the author, referring both to the Public Vessels Act and the Suits in Admiralty Act, says:

> "The Acts authorize suit where, if the government vessels were privately owned or operated or the cargo privately owned or possessed, 'a proceeding in admiralty could be maintained at the time of the commencement of the action' provided for in the Acts. The

> Acts do not say 'where a libel *in rem* could be maintained' but read 'a proceeding in admiralty', a generic term embracing in its natural connotation actions *in rem* and actions *in personam* both of which were separately specified in the original draft for which the final form has substituted a single but inclusive phrase. Equally clear is the implication of the provision that election to proceed upon the principles of libel *in rem* shall not preclude the libellant in any proper case from seeking relief *in personam* in the same suit". (Sec. 195, pp. 457-458).

This Court has expressly held that the Suits in Admiralty Act authorizes suit on causes of action *in personam*. *Eastern Transportation Co.* v. *United States*, 272 U. S. 675.

Below respondent contended that the Public Vessels Act incorporates the Suits in Admiralty Act solely for procedural purposes. This contention, however, ignores the express language of Section 2 of the Public Vessels Act, viz., "such suits *shall be subject to* and *proceed in accordance with*" the Suits in Admiralty Act (italics ours). The words "shall be subject to" must be given meaning and plainly relate to substantive rather than procedural provisions. Procedural provisions are dealt with by the words "proceed in accordance with". The words "shall be subject to" are meaningless surplusage if construed to refer only to the procedural provisions of the Suits in Admiralty Act.

Congress was quite competent to except from its incorporation of the Suits in Admiralty Act such parts of that Act as it wished to except. In Section 2 of the Public Vessels Act, which incorporates the Suits in Admiralty Act, Congress expressly provided that the provisions of the Suits in Admiralty Act for the allowance of interest

against the United States should not be applicable in Public Vessels Act cases.

Since petitioner has admittedly stated a cause of action *in personam*, the libel, and the jurisdiction, must be sustained. Petitioner has elected to proceed on principles of *in personam* as well as on principles of *in rem* liability. Article Sixth of the libel reads:

> "Libellant elects to have this suit proceed in accordance with the principles of libels *in personam* and *in rem*" (R. 3).

III. The decree of the Circuit Court of Appeals should be reversed and the cause remanded with instructions to sustain the jurisdiction and require respondent to answer the libel on the merits, with costs.

Respectfully submitted,

CHAUNCEY I. CLARK,
EUGENE UNDERWOOD,
Counsel for Petitioner.

New York, November 22, 1944.

APPENDIX

PUBLIC VESSELS ACT, March 3, 1925, 43 Stat. 1112, Title 46 U. S. Code, Sections 781-790.

Section 1: "A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided*, That the cause of action arose after the 6th day of April, 1920."

Section 2: "Such suit shall be brought in the district court of the United States for the district in which the vessel or cargo charged with creating the liability is found within the United States, or if such vessel or cargo be outside the territorial waters of the United States, then in the district court of the United States for the district in which the parties so suing, or any of them, reside or have an office for the transaction of business in the United States; or in case none of such parties reside or have an office for the transaction of business in the United States, and such vessel or cargo be outside the territorial waters of the United States, then in any district court of the United States. Such suits shall be subject to and proceed in accordance with the provisions of an Act entitled 'An Act authorizing suits against the United States in admiralty, suits for salvage services, and providing for the release of merchant vessels belonging to the United States from arrest and attachment in foreign jurisdictions, and for other purposes,' approved March 9, 1920, or any amendment thereof, in so far as the same are not inconsistent herewith, except that no interest shall be allowed on any claim up to the time of the rendition of judgment unless upon a contract expressly stipulating for the payment of interest."

SUITS IN ADMIRALTY ACT, March 9, 1920, 41 Stat. 525, 46 U. S. Code, Sections 741-752.

Section 3: "Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. A decree against the United States or such corporation may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. Decrees shall be subject to appeal and revision as now provided in other cases of admiralty and maritime jurisdiction. If the libellant so elects in his libel the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libellant in any proper case from seeking relief in personam in the same suit. Neither the United States or such corporation shall be required to give any bond or admiralty stipulation on any proceeding brought hereunder. Any such bond or stipulation heretofore given in admiralty causes by the United States, the United States Shipping Board, or the United States Shipping Board Emergency Fleet Corporation, shall become void and be surrendered and cancelled upon the filing of a suggestion by the Attorney General or other duly authorized law officer that the United States is interested in such cause, and assumes liability to satisfy any decree included within said bond or stipulation, and thereafter any such decree shall be paid as provided in section 8 of this Act."